

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24

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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA,)	2 CA-CR 2012-0096
)	DEPARTMENT A
Appellee,)	
)	<u>MEMORANDUM DECISION</u>
v.)	Not for Publication
)	Rule 111, Rules of
JAMES DAVID WOMBLE II,)	the Supreme Court
)	
Appellant.)	
_____)	

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20112337001

Honorable Javier Chon-Lopez, Judge

AFFIRMED IN PART; VACATED IN PART

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H O W A R D, Chief Judge.

¶1 After a jury trial, appellant James Womble II was convicted of theft by control of property and trafficking in stolen property. He was sentenced to concurrent prison terms, the longer of which is 5.5 years. The trial court also ordered Womble to pay \$3,400 in restitution to the owner of the stolen property. On appeal, Womble argues the trial court’s restitution award was an abuse of discretion and resulted in “a windfall” to the victim in the amount of \$88. He also maintains the court abused its discretion in “instructing the jury on reasonable doubt pursuant to *State v. Portillo*[182 Ariz. 592, 596, 898 P.2d 970, 974 (1995)].” For the following reasons, we affirm Womble’s convictions and sentences, but vacate that portion of the judgment that states the following: “all fines, fees, assessments and/or restitution are reduced to a Criminal Restitution Order, with no interest, penalties or collection fees to accrue while the defendant is in the Department of Corrections.”

Discussion

¶2 “[W]e view the evidence bearing on a restitution claim in the light most favorable to sustaining the [trial] court’s order.” *State v. Lewis*, 222 Ariz. 321, ¶ 5, 214 P.3d 409, 412 (App. 2009). So viewed, evidence established that Womble gained unauthorized access to the yard of a used auto parts business and loaded wheels belonging to the business into a moving truck he had rented earlier that evening. The following morning, Womble drove the truck to a scrap metal recycling facility and sold 3,640 pounds of aluminum wheels for \$3,312. The jury found Womble guilty of theft of property having a value of \$3,000 or more, but less than \$4,000, and trafficking in stolen property. According to the presentence report, the used auto parts business claimed

restitution in the amount of \$3,400. Womble did not object to any information contained in the report, and, at sentencing, his attorney acknowledged the stolen property had a value of “around \$3,400.”

¶3 Relying on *State v. Zinsmeyer*, Womble argues an “improper restitution order ‘constitutes an illegal sentence, which is fundamental, reversible error’” and contends he “is entitled to have the award of restitution reduced by \$88, or in the alternative, a remand of his case” for a restitution hearing. 222 Ariz. 612, ¶ 37, 218 P.3d 1069, 1082 (App. 2009), *overruled on other grounds by State v. Bonfiglio*, ___ Ariz. ___, ¶ 15, 295 P.3d 948, 951 (2013). But in *Zinsmeyer*, we considered the unauthorized, “premature entry of a criminal restitution order” pursuant to A.R.S. § 13-805(C), not the amount of restitution awarded. *Id.*; *see also State v. Baker*, 126 Ariz. 531, 533, 617 P.2d 39, 41 (App. 1980) (defendant who fails to object to presentence report pursuant to Rule 26.8(a), Ariz. R. Crim. P., waives appellate challenge to facts reported).

¶4 “‘A court has wide discretion in setting restitution based on the facts of each case,’” and “[w]e will uphold a restitution award if it bears a reasonable relationship to the loss sustained.” *State v. Dixon*, 216 Ariz. 18, ¶ 11, 162 P.3d 657, 660 (App. 2007), *quoting State v. Ellis*, 172 Ariz. 549, 551, 838 P.2d 1310, 1312 (App.1992). The award must be based on “some evidence,” *State v. Scroggins*, 168 Ariz. 8, 9, 810 P.2d 631, 632 (App. 1991), but a court may rely on a presentence report to satisfy this standard, *Dixon*, 216 Ariz. 18, ¶ 13, 162 P.3d at 660.

¶5 According to Womble, the trial court abused its discretion in awarding the \$3,400 claimed because the presentence report contained “no explanation as to why the

amount exceeded,” by \$88, “the amount paid to [him] for the stolen wheels.” But Womble fails to address trial testimony from the manager of the auto parts store that “the majority of [its] business” involved the retail sale of used automotive parts for use in other vehicles and that only wheels that could not be sold in this manner were recycled as aluminum. In contrast, Womble sold the stolen wheels for scrap. The value of the stolen property was not limited to its salvage value, and the court did not abuse its discretion in concluding the claim of \$3,400 was reasonably related to the loss sustained, in light of the difference between the retail and salvage value of the wheels. *Cf. State v. Rushing*, 156 Ariz. 1, 4, 749 P.2d 910, 913 (1988) (owner of property “competent to give an opinion of its value”).

¶6 With respect to Womble’s challenge to the trial court’s reasonable doubt instruction, our supreme court has rejected similar constitutional challenges to the *Portillo* instruction. *See, e.g., State v. Dann*, 220 Ariz. 351, ¶¶ 64-65, 207 P.3d 604, 618 (2009); *State v. Garza*, 216 Ariz. 56, ¶ 45, 163 P.3d 1006, 1016-17 (2007); *State v. Ellison*, 213 Ariz. 116, ¶ 63, 140 P.3d 899, 916 (2006). As Womble acknowledges, this Court is bound by the decisions of the Arizona Supreme Court and does not have the authority to modify or disregard its rulings. *State v. Smyers*, 207 Ariz. 314, n.4, 86 P.3d 370, 374 n.4 (2004); *City of Phoenix v. Leroy’s Liquors, Inc.*, 177 Ariz. 375, 378, 868 P.2d 958, 961 (App. 1993).

Disposition

¶7 In its sentencing minute entry, the trial court stated it was reducing “all fines, fees, assessments and/or restitution” to a criminal restitution order (CRO), *see* § 13-

805(C), ordering that “no interest, penalties or collection fees [were] to accrue while [Womble] is in the Department of Corrections.” But “the imposition of a CRO before the defendant’s probation or sentence has expired ‘constitutes an illegal sentence, which is necessarily fundamental, reversible error.’” *State v. Lopez*, No. 2 CA-CR 2012-0153, ¶ 2, 2013 WL 1450722 (Ariz. Apr. 8, 2013), *quoting State v. Lewandowski*, 220 Ariz. 531, ¶ 15, 207 P.3d 784, 789 (App. 2009). Because this portion of the court’s minute entry order is unauthorized by statute, *see id.* ¶ 5, we vacate the CRO. We otherwise affirm Womble’s convictions and sentences, including the restitution award.

/s/ Joseph W. Howard

JOSEPH W. HOWARD, Chief Judge

CONCURRING:

/s/ Peter J. Eckerstrom

PETER J. ECKERSTROM, Presiding Judge

/s/ Michael Miller

MICHAEL MILLER, Judge